IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 299 OF 2006

Advokatfirman Vinge KB ....Plaintiffs.

vs.

Royal Cushion Vinyl

Products P.Ltd and anr. ....Respondents.

Zubin B. Kamadin i/by. Amarchand and Mangaldas and S.A. Shroff and Co. for the petitioner.

Mr.S.N.Shah with Z.A.Jariwala and Chanda Sonpal i/by.Thakordas Jariwala and Associates for the respondents.

CORAM: S.J. VAZIFDAR, J.

NOVEMBER 17, 2006.

P.C. :

1. There is hardly any dispute that the amounts are due and payable by the respondent to the petitioner in respect of which the petitioner has commenced

arbitration proceedings. This infact is inter-alia clear from the respondents e-mail message dated 25.5.2006 (Exhibit A to the petition) where the respondent admitted having accepted the petitioners fees without any question albeit on trust basis.

2. Preliminary objections were further raised to the maintainability of this application.

3. Mr. Shah submitted that the petition is not maintainable. He relied upon the judgment of the Supreme Court in *Bhatia International vs. Bulk Trading S.A. and anr (2002) 4 SCC 105.* Paragraph 32, 33 and 34 whereof read as under :

> 32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

33. Faced with this situation Mr Sen submits that, in this case the parties had agreed that the arbitration be as per the Rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view, in such cases the question would be whether Section 9 gets excluded by the ICC Rules of Arbitration. Article 23 of the ICC Rules reads as follows: Conservatory and interim measures 1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the Arbitral Tribunal considers appropriate. 2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

34. Thus Article 23 of the ICC Rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Section 9 of the said Act." (emphasis applied)

4. Mr. Shah submitted that the effect of the judgment is that unless there is a provision in the arbitration agreement that interim measures may be adopted by a party thereto, an application under Section 9 would not be maintainable. The submission is not well founded.

5. The existence of such a provision in that case (Clause 2 of Article 22 of the ICC Rules reproduced in paragraph 33 of the judgment) was only an additional factor. In the event of the agreement being silent to wit the agreement not specifying whether or not the party may make an application for interim reliefs the provisions of Part I would apply. This is clear from the ratio contained in paragraph 32 of the judgment which has been emphasized by me.

6. Thus even assuming that the agreement does not contain any provision entitling the parties thereto to seek interim relief the same would not bar them from doing so under Section 9 of the Act.

7. The next contention was based on Clause 3.8 of the agreement between the parties which reads as under :

> "3.8 This agreement is governed by Swedish law. Any dispute or controversy shall be resolved by arbitration in Stockholm according to the rules for expedited arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce. "

8. Mr. Shah submitted that as the parties have agreed to be governed by the Swedish law, the provision of Swedish law become a term of the contract between the parties. He submitted that only in the event of the Swedish Law having a provision similar to Section 9 of the 1996 Act would the present application be maintainable.

9. This submission must be answered against the respondent for the reasons stated in respect of the first submission. I will assume that the Swedish law is a contractual term incorporated in the

agreement between the parties and that the Swedish Law does not contain a provision similar to Section 9 of the 1996 Act. As I have already held the absence of a term in a contract entitles a party to make an application for inter-locutory reliefs.

10. Mr. Shah further submitted that the petitioner had not established the Swedish law, which, like any other foreign law would be a question of fact. Unless the contrary is established the presumption is that the foreign law is the same as Indian Law. The onus is upon the party contending otherwise to establish the same. This point is covered by the judgment delivered by me in the case *Malaysian International Trading Corporation Sdn Bhd & Anr. vs. Mega Safe Deposit Vaults Ltd (2006) 3 LJ SOFT (URC) 27 = AIR 2006 Bom R 437.* I am informed that an appeal against the judgment is pending.

11. In the circumstances following order is passed :

(i) Respondent no.2 is restrained by an order and injunction from disposing off, alienating, encumbering or creating any third party right, title and/or interest in respect of his immovable assets including the property disclosed in his affidavit dated 17/7/2006 pending the hearing and final decision in the arbitration proceedings and for a period of four weeks thereafter.

(ii) Defendant no.2 shall before disposing
7 off any of its immovable properties give a notice of four weeks in writing to the petitioner’s advocate of his intention of doing so.

(ii) Mr. Shah, states that defendant no.1 is before the BIFR. In the circumstances, he submits that no order attaching the properties of defendant no.1 can be passed. I am informed that the BIFR has already passed an order restraining defendant no.1 from disposing off his assets.

. Petition is accordingly disposed off in above terms.

sd/-

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